

In the Matter of Salvatore Maggio,
Department of Law & Public Safety
DOP Docket No. 2004-49

(Merit System Board, decided March 24, 2004)

Salvatore Maggio, a former Captain with the Division of State Police, Department of Law and Public Safety (DL&PS), appeals the attached determination of DL&PS' Deputy Chief of Staff, stating that there was probable cause to substantiate a finding that he violated the New Jersey State Policy Prohibiting Discrimination, Harassment or Hostile Environments in the Workplace (State Policy). It is noted that the appellant retired from State service effective March 31, 2000.

In a letter dated June 20, 2003, DL&PS informed the appellant that its Equal Employment Opportunity and Affirmative Action Unit (EEO/AA) had conducted an investigation into allegations of violations of the State Policy filed by Trooper Roy Victor.¹ This investigation substantiated Victor's claim that he was reassigned in 1998 from the Totowa Substation to the Somerville Station in Bridgewater due to a disability. While the EEO/AA determined that it did not appear that the appellant intentionally discriminated against Victor, the numerical comparison for a six-month period utilized by the appellant to base his decision on whom to reassign did not consider that Victor was out on sick leave for a significant portion of the time period measured. The EEO/AA concluded that the comparison of Victor to other troopers should have taken into account that he had fewer patrol hours than other troopers. Additionally, the EEO/AA found that if productivity during the patrol hours actually worked was considered, Victor would not have ranked among the three lowest troopers in productivity and therefore, based on the appellant's rationale, would not have been reassigned. Moreover, the EEO/AA found that Victor's allegation that the reassignment constituted race discrimination was not substantiated. Further, the June 20, 2003 letter indicated that were the appellant still an active member of the State Police, he would have received counseling concerning the appropriate consideration of disability issues in employment decisions. However, since the appellant had retired, he was beyond the reach of administrative action.

On appeal to the Merit System Board (Board), the appellant asserts that Victor was not reassigned due to a disability. The appellant claims that

¹ It is also noted that Victor filed a subsequent discrimination complaint dated January 9, 2002, alleging, *inter alia*, retaliation for filing the discrimination complaint under review in this matter. DL&PS found no evidence of discrimination in that matter. Subsequently, Victor appealed the decision to the Merit System Board, which denied his appeal in *In the Matter of Roy Victor* (MSB, decided February 26, 2003).

Lieutenant Robert Kenyon,² the Totowa Substation Commander, brought to his attention that Victor was a malingerer and was missing many days of work which was causing a problem on the squad to which he was assigned. In this regard, the appellant contends that it was obvious to him that there was a conflict between Kenyon and Victor. Therefore, in order to avoid further conflict, the appellant thought it would be best to reassign Victor. Additionally, the appellant asserts that by reassigning Victor, he would be able to monitor his work ethic and performance at a new location. Further, the appellant contends that at the time of the reassignment, Victor lived in Newark, which is about equal distance to the Totowa Substation and Somerville Station. Moreover, the appellant argues that the time frame of this investigation was excessive, as the reassignment occurred in 1998 and the determination was not made until 2003. Finally, the appellant requests a copy of the investigation report.

In response, the DL&PS, represented by Don E. Catinello, DAG, submits a detailed response to the appellant's allegations in support of its determination. Initially, the DL&PS states that Victor's reassignment was effective April 11, 1998, and that he filed his complaint alleging that his reassignment was due to discrimination on August 4, 1999. Additionally, it states that Victor was out on medical leave at the time the reassignment took place. The DL&PS asserts that the EEO/AA interviewed the appellant, who indicated that Victor was reassigned due to a decline in his work ethic and job performance. The appellant also indicated that another trooper was on extended leave during the period in question but that his work ethic and job performance were acceptable so he was not reassigned. The EEO/AA also interviewed Kenyon, who denied that Victor was reassigned due to excessive sick leave. Kenyon indicated that he was told by the appellant to recommend troopers to be reassigned from the Totowa Substation. In this regard, Kenyon asserted that his recommendation was based solely upon statistics in reviewing the productivity of the different troopers with regard to summonses, warnings, drunk driving arrests, and criminal arrests. Based on these results, three troopers were reassigned, including Victor. Further, Kenyon stated that he did not discuss with the appellant the issue of Victor's numbers being low as a result of his use of sick time during the period measured.

In addition, the EEO/AA concluded that a review of statistics during the relevant period showed that the summonses and warnings issued by Victor were comparable to those of other troopers at the Totowa Substation. While Victor did not have any criminal arrests or DWI arrests during the six-month time period measured, he did utilize 180 hours of sick time during this time frame. Based on this analysis, the EEO/AA determined that had Victor

² Kenyon retired from State service effective December 31, 1999.

been compared to other troopers based on the number of hours worked, Victor would have been shown to be more productive than other troopers and would not have been reassigned. The EEO/AA concluded that the question of whether the six-month comparison was fair to Victor since he had been out on sick leave for 180 hours during the course of the six months was never considered by the appellant or Kenyon. It is noted that although the DL&PS asserted that Victor received injuries from two separate motor vehicle accidents, it did not indicate the nature of Victor's disability.

In reply, the appellant argues that based on his 20 years of experience as a supervisor and his training, including the completion of a Certified Public Manager Program, reassigning an individual is an important tool to eliminate conflict and to help both the supervisor and the subordinate. Additionally, the appellant explains that the State Police is a para-military organization and the reassignment policy of the Division is important to monitor and control the employees in the Division. In this regard, the appellant contends that Victor was reassigned because it was obvious to him and Kenyon that Victor was a malingerer. Additionally, the appellant contends that at the time he studied Victor's activities, he determined that they were below par even when considering his limited patrol hours due to his sick leave status. Further, the appellant contends that he considered the Department and Division's policy against discrimination with regard to disabilities when making the reassignments in question and does not believe that he violated these policies.

CONCLUSION

The appellant requests a copy of the investigation report in this matter. Initially, the Board notes that a copy of the investigation report is required only in circumstances where the appointing authority fails to provide a detailed description of the investigation conducted, witnesses interviewed, and conclusions reached so as to render it impossible for the Board to make an informed determination of the issues in question. *See In the Matter of Theresa Lockette* (MSB, decided May 7, 2003). In the instant matter, a detailed response was submitted by the appointing authority which adequately described the EEO/AA's investigation into the allegations against the appellant. Therefore, a copy of the actual investigation report is not required in the instant matter.

The Board has conducted a review of the record in this matter and finds that the appointing authority's conclusion that the appellant violated the State Policy is not substantiated by the record. The DL&PS determined that the appellant's reassignment of Victor constituted a violation of the

State Policy based on a disability due to the appellant's failure to consider Victor's extensive absences when examining a statistical analysis of troopers for a six-month period. In this regard, the EEO/AA claims that had the appellant taken the absences into consideration, Victor would not have been one of the lower ranking troopers and would not have been reassigned. The appellant argues that he did take Victor's absences into consideration. Further, the appellant contends that he reassigned Victor to avoid a conflict between Victor and Kenyon, and also to observe the appellant's work ethic and performance, as Kenyon reported Victor to be a malingerer. The Board finds the appellant's arguments persuasive. In reviewing the record, there is no indication that the appellant was not authorized to reassign Victor to avoid conflict or to observe and evaluate Victor's performance in another setting. In fact, the DL&PS does not contend that the appellant violated any guidelines or procedures, other than the State Policy, in reassigning Victor. Further, although there is a dispute as to whether the appellant took into account Victor's absences when conducting a statistical analysis of which troopers to reassign, the Board finds that the outcome of the statistical analysis is irrelevant as the appellant has convincingly argued that he reassigned Victor for other legitimate business reasons. In this regard, the Board notes that the DL&PS did not dispute the reasons for reassigning Victor provided by the appellant on appeal.

Moreover, *N.J.A.C.* 4A:7-1.1(c) provides that persons with disabilities include any person who has a physical or mental impairment which substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment. *See also* 29 *U.S.C.* § 705. Persons with disabilities also include persons who are defined as handicapped. Additionally, *N.J.S.A.* 10:5-5(q) defines a disability as a physical disability, infirmity, malformation, or disfigurement which is caused by bodily injury, birth defect or illness or any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions.

In the instant matter, the DL&PS does not indicate the nature of Victor's disability nor did Victor explain the nature of his disability in his complaint.³ The mere fact that Victor was out on leave for the equivalent of 22.5 days during a six-month period does not constitute a disability under the State Policy. Therefore, since it appears that the appellant based his decision to reassign Victor on factors other than a statistical analysis, and the DL&PS does not clearly indicate the nature of Victor's disability, the Board finds that

³ In this regard, in his complaint, the only reference to any disability made by Victor includes the statement, "I became angry, and stated, I was being punished for being hurt on the job twice on August 1995 and August 1996."

the appellant has met his burden of proof in this matter. Accordingly, the Board finds that the allegation that the appellant violated the State Policy is not substantiated.

A final comment is warranted in this matter. The Board is very concerned with the nearly **four-year** delay between the filing of the complaint and the issuance of a determination letter. Such a delay is unacceptable. *N.J.A.C. 4A:7-3.2(k)*¹ provides that investigations shall be completed and a final letter of determination issued within 120 days after the initial intake of the complaint. In the instant matter, the DL&PS ignored the timeliness issue raised by the appellant on appeal. Therefore, no explanation for the delay is present in the record. The DL&PS should be aware that the Board takes the timeliness issue seriously, and that future egregious violations, as in the instant matter, may result in fines or other appropriate action. *See N.J.A.C. 4A:10-2.1.*

ORDER

Therefore, it is ordered that this appeal be granted and the appellant's personal record be corrected to reflect the Board's finding that the allegations that he violated the State Policy were not substantiated.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.